Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

MARVIN MORRIS MITCHELSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

MUST A FEDERAL DISTRICT COURT IN A CRIMINAL TAX PROSECUTION INSTRUCT THE JURY ON A GOOD FAITH DEFENSE WHEN SUCH AN INSTRUCTION IS REQUESTED BY THE DEFENSE AND IS SUPPORTED BY EVIDENCE PRESENTED AT TRIAL?

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For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Marvin Morris Mitchelson, the petitioner in the above-captioned case, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on March 29, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on March 29, 1995. A copy of that opinion appears herein as Appendix "A." A timely Petition For Rehearing was filed in the United States Court of Appeals for the Ninth Circuit. That Petition for

Rehearing was denied on June 5, 1995. (A copy of that order appears herein as Appendix "B."

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 26 section 7206(1).

The relevant statutory provision is set forth in Appendix "C" of this Petition.

STATEMENT OF THE CASE

An indictment was returned in the Central District of California on August 12, 1992, charging Petitioner, Marvin Morris Mitchelson, with four counts of subscribing to a false income tax return in violation of 26 U.S.C. section 7206(1). The indictment alleged that Petitioner had subscribed to false income tax returns for four different tax years: 1983, 1984, 1985 and 1986.

Trial began in the federal district court on December 15, 1992. The prosecution's theory at trial was that Petitioner, an internationally known family law attorney and creator of the "palimony" cause of action, failed to report certain legal fees he had earned as income, falsely claimed that he paid other attorneys funds which they

did not actually receive, and falsely declared money he gave to girlfriends as a business deduction.[1] Petitioner acknowledged at trial that the tax returns were inaccurate, but asserted that he was not aware of the inaccuracies at the time the returns were subscribed and did not intend to subscribe false returns.

The prosecution's main witness at trial was Petitioner's accountant. The accountant testified that he was hired to prepare Petitioner's tax returns at a time when Petitioner's financial situation was chaotic. The accounting and banking procedures utilized by Petitioner's law office were extremely disorganized and the firm's financial records were inadequate, if they existed at all. The accountant spent nearly 18 months gathering the records necessary to prepare the returns. Nevertheless, "gaps" in the records remained. To fill the gaps in the records, the accountant asked for and received from Petitioner handwritten slips of paper, often on hotel stationery, listing the legal fees Petitioner had received from various clients. The accountant also received from Petitioner's law office letters listing amounts of money paid to other lawyers who had worked on various cases. Both the handwritten slips and the letters listing payments to other attorneys were later determined to be inaccurate. Nevertheless, both records were used by the accountant to prepare Petitioner's tax returns.

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[1] Petitioner was also counsel for the defendant in *Douglas v. California*, 372 U.S. 353 (1963) before this Court.

Petitioner was unaware that the accountant relied upon the handwritten slips in preparing the returns. Petitioner was also out of town when the letters listing fees paid to other lawyers were prepared by his office and sent to the accountant. Petitioner was not aware how the letters were to be utilized by the accountant. Petitioner signed the tax returns when he returned home from being out of state on business and was unaware that, as a result of the actions of the accountant, the returns were inaccurate.[2]

Willfulness is an element of the offense of filing a false tax return. (26 U.S.C. section 7206(1).) At trial, Petitioner requested that the district court give the following instruction defining willfulness and conveying that an honest or negligent mistake did not constitute willfulness.

> The crime charge in this case . . . requires proof of specific intent before the defendant can be convicted . . . To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids . . . purposely intending to violate the law . . . An act or failure to act is "knowingly" done, if done voluntarily and intentionally, *and not because of mistake or accident or other innocent reason.* (Emphasis added.)

The district court refused to give the requested instruction. Petitioner alternatively requested an instruction that stated: "Negligent conduct is not sufficient to constitute

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[2] The Ninth Circuit found that Petitioner had presented evidence of the accountant's negligence in preparing the tax returns and that this evidence, if believed, demonstrated Petitioner's lack of willfulness. (Appendix A, page 5.)

willfulness." The district court also rejected that instruction. Instead, the district court gave an instruction which stated: The willfulness requirement is defined as "the voluntary and intentional violation of a known legal duty."

On February 9, 1993, after some thirty days of trial, the jury found Petitioner guilty of all four offenses alleged in the indictment. On April 12, 1993, the district court sentenced Petitioner, then sixty-four years old, to a thirty month prison term and imposed a restitution fine of $2,158,796.

Petitioner's timely appeal in the Ninth Circuit followed. That court had original jurisdiction over Petitioner's appeal pursuant to 18 U.S.C. section 1291.

On appeal, Petitioner argued that the district court erred in not giving his requested jury instruction defining willfulness. The Ninth Circuit rejected that contention. The Circuit court held that the jury instruction given by the district court "is a correct statement of the law, and is in fact taken from the Supreme Court's definition of willfulness in *United States v. Pomponio*, 429 U.S. 10, 12 (1976)." (Appendix A, page 5.) The Circuit court then rejected Petitioner's "argument that the (district) court's instruction on willfulness did not make sufficiently clear that a finding of negligence would preclude a finding of willfulness on his part, and that a separate instruction was required." (Appendix A, page 5.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to reconcile the conflict between two opinions of this Court. Additionally, the circuit courts have resolved the conflict in this Court's opinions in different ways thus leading to a conflict among the circuits.

In *United States v. Pomponio*, 429 U.S. 10 (1976), a *per curiam* opinion, this Court reaffirmed the definition of "willfulness," as that term is used in criminal tax offenses including 26 U.S.C. section 7206(1), set forth by the Court in *United States v. Bishop*, 412 U.S. 346, 360 (1973). *Bishop* had defined willfulness as the "voluntary, intentional violation of a known legal duty." *Id.* The *Pomponio* opinion went on to add that once a jury was instructed on the *Bishop* definition of willfulness an "additional instruction on good faith (as a defense) was unnecessary." *United States v. Pomponio, supra*, 429 U. S. at 13.

This Court has also recognized as a well established "general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). The circuit courts have also long adopted this "general proposition." See *United States v. McGill*, 953 F.2d 10, 12 (1st Cir. 1992); *United States v. Solomon*, 825 U.S. F.2d 1292, 1295 (9th Cir. 1987); *United States Ex. Rel. Peery v. Sielaff*, 615 F.2d 402, 403 (7th Cir. 1979); *Strauss v. United States*, 376 F.2d 316, 419 (5th Cir. 1967).

There exists an obvious conflict between *Pomponio* and *Mathews* in criminal tax prosecutions in which the defendant presents sufficient evidence of a good faith defense. *Pomponio* commands that a separate instruction

on a good faith defense is not necessary even if the defendant has presented sufficient evidence in support of that defense. *Mathews* commands that whenever a defendant has presented sufficient evidence in support of a defense, an instruction on that defense should be given.

The obvious conflict between *Pomponio* and *Mathews* has caused a divergence of opinion among the circuit courts. Some circuits have applied *Pomponio* literally and have refused to require district courts to give instructions on a good faith defense in criminal tax prosecutions even when sufficient evidence was presented in support of such a defense. Other circuits have ruled that despite *Pomponio*, when a defendant in a criminal tax prosecution presents sufficient evidence to support a good faith defense, the district court must separately instruct on that defense.

This Court should grant certiorari in Petitioner's case to resolve the obvious conflict between *Pomponio* and *Mathews* in criminal tax prosecutions. Certiorari should also be granted to resolve the divergent opinions among the circuit courts as to how to best resolve this conflict.

The Ninth Circuit has chosen to read *Pomponio* literally and to the exclusion of *Mathews*. In Petitioner's case, for instance, the circuit court recognized that Petitioner had presented evidence at trial of his accountant's negligence and Petitioner's "good faith but mistaken belief" that all of his income had been reported on his tax returns. (Appendix A, p. 5.) At trial, Petitioner had requested instructions indicating that "negligent conduct

is not sufficient to constitute willfulness."[3] The Ninth Circuit held that the definition of wilfulness given by the district court, "taken from the Supreme Court's definition of willfulness in *United States v. Pomponio,*" was sufficient alone and that "no additional instruction" on the good faith defense "was necessary." (Appendix A, p. 5.)[4] The Ninth Circuit has consistently followed this reasoning despite recognizing that other circuits have rejected it. *United States v. Sehnal,* 930 F.2d 1420, 1427 (9th Cir. 1991); *United States v. Dorotich,* 900 F.2d 192, 193-194 (9th Cir. 1990).

The Fifth and Sixth Circuits have adopted the same reasoning. In *United States v. Wilson,* 887 F.2d 69, 76-77 (5th Cir. 1989) the Fifth Circuit held that a willfulness instruction given in a tax prosecution "was substantially correct" and that under *Pomponio* an "additional instruction on good faith was not necessary." See also *United States v. Garcia,* 762 F.2d 1222, 1224 (5th Cir. 1985) a tax prosecution in which the district court did give an additional instruction on good faith but the Fifth Circuit noted that "the district court was not required to instruct the jury on good faith." *Id.,* at 1224 fn. 2. Similarly in *United*

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[3] Petitioner's requested instructions included an instruction on the definition of willfulness taken directly from Devitt and Blackmar, *Federal Jury Practice and Instructions,* 1990 Ed. section 56.20.

[4] Petitioner had argued in his Opening Brief before the Ninth Circuit that he was entitled to the good faith instruction in part because "A defendant is entitled to a jury instruction on a theory of defense if the theory has a basis in law and in the record. *United States v. Solomon,* 825 F.2d 1292, 1295 (9th Cir. 1987)."

States v. Sassak, 881 F.2d 276, 280 (6th Cir. 1989) the Sixth Circuit held that the district court had properly defined willfulness in a tax prosecution and that "the *Pomponio* court found that an additional instruction on good faith belief to be unnecessary."

The Tenth Circuit has rejected the position of the Fifth, Sixth and Ninth Circuits and has attempted to harmonize *Pomponio* and *Mathews*. In *United States v. Harting*, 879 F.2d 765, 767 (10th Cir. 1989), a criminal tax prosecution, the Tenth Circuit quoted *Mathews v. United States, supra*, 485 U.S. at 63 in support of its conclusion that:

> In addition, we have held that the trial court must instruct separately on the defense of good faith: "Instructions on wilfulness, on aspects of intent, on untruth of representations or fraudulent statements are ***not*** sufficient for this purpose. There must be a full and clear submission of the good faith defense as such." (Quoting *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984 en banc.), emphasis in *Hopkins*.)

The government argued in *Harting* that the decision in *Pomponio* contradicts the requirement set forth in *Hopkins* "that a general instruction on willfulness is not sufficient when the evidence supports the giving of a good-faith instruction." *United States v. Harting, supra*, 879 F.2d at 769. The Tenth Circuit rejected the government's argument. Instead, the court found the *Hopkins* requirement of a separate good faith instruction "to be consistent with the Supreme Court's holding in *Pomponio*." *Id.* at 770. The Tenth Circuit has consistently applied the rule announced in *Harting* requiring a separate good faith instruction in

criminal tax prosecutions when sufficient evidence of a good faith defense has been presented. *United States v. Hernandez-Urista*, 9 F.3d 82, 84 (10th Cir. 1993); *United States v. Haddock*, 956 F.2d 1534, 1547 (10th Cir. 1992); *United States v. Mann*, 884 F.2d 532, 536-537 (10th Cir. 1989); *United States v. Harrold*, 796 F.2d 1275, 1282-1283 (10th Cir. 1986).

In *United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985) the Eighth Circuit expressly adopted the Tenth Circuit's reasoning as set forth in *Hopkins*. See also *United States v. Kouba*, 822 F.2d 768, 771 (8th Cir. 1987) as approving good faith instructions. Thus, both the Eighth and Tenth Circuits have rejected the reasoning of the Fifth, Sixth and Ninth Circuits and have harmonized *Pomponio* and *Mathews*. In so doing the Eighth and Tenth Circuits have adopted a rule that requires district courts to give a good faith defense instruction where such a defense is supported by evidence presented at trial. Had the Ninth Circuit adopted the reasoning of the Eighth and Tenth Circuits, it would have reversed Petitioner's convictions due to the district court's failure to give a good faith instruction.

Clearly the opinions of the Fifth, Sixth and Ninth Circuits are in conflict with the opinions of the Eighth and Tenth Circuits. This conflict has been created by this Court's failure to harmonize *Pomponio* and *Mathews*. This Court ought to grant Certiorari in this case so that it may set forth a rule harmonizing *Pomponio* and *Mathews*. Such a rule would require district courts to instruct on good faith defenses where evidence has been presented supporting such a defense. By harmonizing *Pomponio* and *Mathews*, the Court would also resolve the conflicting

opinions among the circuit courts in criminal tax prosecutions.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted.

Dated: August 29, 1995

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARVIN MORRIS MITCHELSON, Defendant-Appellant.	CA No. 93-50279 DC No. CR-92-00716-WK MEMORANDUM* (Filed Mar. 29, 1995)

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted January 10, 1995
Pasadena, California

BEFORE: CANBY and NOONAN, Circuit Judges, and KING,** District Judge

The parties are familiar with the facts of the case; we shall not recite them here. The district court did not err in admitting evidence of Mitchelson's extravagant spending, his debts, or his tax history. Nor did it err in refusing Mitchelson's proffered jury instructions on the definition

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

of willfulness as it pertained to his charged offense. Further, the district court avoided any possible double jeopardy problems by sentencing Mitchelson to concurrent sentences on both the pre- and post-guideline counts of his conviction. Finally, the court had sufficient evidence before it in the record that Mitchelson may be able to pay the $2.1 million ordered in the future to justify its restitution order. We therefore affirm both the conviction and the sentence.

I. EVIDENCE OF MITCHELSON'S DEBTS, SPENDING HABITS AND TAX HISTORY.

We review evidentiary rulings for abuse of discretion. *United States v. Blaylock*, 20 F.3d 1458, 1462 (9th Cir. 1994). In its case-in-chief, and again on cross-examination during Mitchelson's defense, the government introduced evidence concerning Mitchelson's expenditures and his tax history. Mitchelson argues that none of this evidence is relevant in the first place, and that in any case Fed. R. Evid. 404(b) should have barred all of it. Mitchelson is incorrect.

Rule 404(b) prohibits evidence of other acts "to prove the character of a person in order to show action in conformity therewith." The rule does allow "other act" evidence for alternate purposes, such as proving motive, intent, or absence of mistake. Rule 404(b) is a rule of "inclusion which admits evidence of other crimes or acts relevant to an issue on trial, *except* where it tends to prove *only* criminal dispostion." *United States v. Bradshaw*, 690 F.2d 704, 708 (9th Cir. 1982), *cert. denied*, 463 U.S. 1210 (1983).

The district court was within its discretion when it found that the challenged items of evidence served at least one of these three purposes. Each instance of Mitchelson's lavish spending is relevant to proving motive at least, and perhaps willfulness directly. "Evidence that tends to show that a defendant is living beyond his means is of probative value in a case involving a crime resulting in financial gain." *United States v. Feldman*, 788 F.2d 544, 557 (9th Cir. 1986) (*quoting United States v. Saniti*, 604 F.2d 603, 604 (9th Cir.) (per curiam), *cert. denied*, 444 U.S. 969 (1979)). *See also United States v. Hughes*, 766 F.2d 875, 878 (5th Cir. 1985) (evidence of large expenditures admissible to show motive to commit tax fraud).

Similarly, any evidence of Mitchelson's financial difficulties was probative of his motive to make a false return. *United States v. Feldman*, 788 F.2d 544, 557 (9th Cir. 1986) (evidence of debts admissible to show motive to commit bank robbery); *United States v. Tierney*, 424 F.2d 643, 646 (9th Cir.), *cert. denied*, 400 U.S. 850 (1970) (evidence of failing business admissible to show motive to sell counterfeit money). The government here asked jurors to infer that one who is in sudden, immediate and desperate need of money is more likely motivated to commit a crime, such as fraudulently understating his income to retain that money, than one who has no such need. That inference is not implausible.

Evidentiary items relating to Mitchelson's tax history are admissible either to show his intent or to prove absence of mistake. Mitchelson's consistent failure to file timely returns or to pay taxes due, and the resultant tax liens imposed upon him, all make it more likely that the charged conduct was not an inadvertent lapse, but was

the result of a deliberate and conscious choice to avoid paying taxes. *United States v. Snow*, 529 F.2d 224, 226 (9th Cir. 1976) (prior failures to file returns admissible to show willfulness in tax fraud case).

Nor is the probative value of the challenged evidence substantially outweighed by the danger of unfair prejudice. Although the evidence, taken without any limiting instruction, would certainly be prejudicial, the test is whether it is *substantially* more *unfairly* prejudicial to the defendant than it is probative of an element of the charged offense. *United States v. Layton*, 855 F.2d 1388, 1402 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989). The evidence in question is highly probative of Mitchelson's motive and willfulness, and so erects a high barrier to exclusion. The district court minimized any unfair prejudice to Mitchelson with limiting jury instructions, *see Huddleston v. United States*, 485 U.S. 681, 619-92 (1988), which instructions the jury is presumed to follow. *United States v. Restrepo*, 884 F.2d 1294, 1296-97 (9th Cir. 1989).

II. THE DISTRICT COURT'S REFUSAL OF MITCHELSON'S PROFFERED JURY INSTRUCTION.

The Circuit has yet to resolve whether a district court's denial of a defendant's proposed jury instruction is reviewed *de novo* or for abuse of discretion. *See United States v. Dinkane*, 17 F.3d 1192, 1200 (9th Cir. 1994) (noting conflict and applying abuse of discretion standard); *United States v. Reese*, 2 F.3d 870, 883 (9th Cir. 1993) (applying *de novo* standard). Even under the stricter *de novo* standard, however, the district court did not err in

refusing Mitchelson's proposed instruction on willfulness.

After instructing the jury that, in order to convict Mitchelson, they must find that he acted willfully in filing a false return, the district court went on to define willfulness as "the voluntary and intentional violation of a legal duty." Mitchelson proposed, and the district court rejected, an additional instruction to the effect that "negligent conduct is not sufficient to constitute willfulness."

The court's instruction is a correct statement of the law, and is in fact taken from the Supreme Court's definition of willfulness in *United States v. Pomponio*, 429 U.S. 10, 12 (1976). We do not accept Mitchelson's argument that the court's instruction on willfulness did not make sufficiently clear that a finding of negligence would preclude a finding of willfulness on his part, and that a separate instruction was required.

Mitchelson presented evidence at trial that LeRoy's negligence, or good faith but mistaken belief that he had reported all of Mitchelson's income on the return, was the cause of the false return. If the jury believed this evidence, they could not find that Mitchelson willfully made a false return. Because Mitchelson was free to present this and other evidence supporting his theory of defense, no additional instruction was necessary. The district court did not commit reversible error in selecting only the instructions that it did.[1]

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[1] We recognize the error on page 5880 of the reporter's transcript, where the reporter's omission of the word "not" in recording jury instruction 16 controverts the meaning of the

III. AGGREGATION OF LOSSES RESULTING FROM PRE-GUIDELINE AND POST-GUIDELINE COUNTS AND POSSIBLE DOUBLE-JEOPARDY EFFECTS?

We review *de novo* the district court's interpretation of the Sentencing Guidelines. *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1174 (9th Cir. 1994).

Mitchelson complains that in calculating his sentence, the court double-counted the amount of loss attributable to the income he concealed in 1983 and 1984. The court considered that loss in determining his pre-Guideline sentence on counts one and two. Mitchelson points out that the court then considered that same loss again, pursuant to section 3D1.2(d) of the Guidelines, in determining the aggregate loss in all four related offenses while calculating his sentences for counts three and four.

Mitchelson may be correct that the district court double-counted the losses resultant from counts one and two. The court avoided any consequential double-jeopardy problem, however, by ordering that Mitchelson's sentences run concurrently. This court has identified the use of concurrent sentences as one of two ways to escape the double-counting problem when imposing pre- and post-guideline sentences together. *United States v. Mullins*, 992 F.2d 1472, 1479 (9th Cir.), *cert. denied*, 113 S. Ct. 2997 (1993); *United States v. Niven*, 952 F.2d 289, 293-94 (9th Cir. 1991).

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actual instruction given. Our decision relies in no part on either the transcript error or on the affected paragraph on page 26 of the government's response brief.

Mitchelson argues that the court's calculation method still violated the Double-Jeopardy Clause because, if the court had employed the other sentencing method approved by *Niven*, he would have received a shorter sentence. Whether or not Mitchelson's assertion is true, *Niven* leaves to the district court's discretion the choice between its alternative calculation methods. *Niven*, 952 F.2d at 294. The district court thus did not err in determining Mitchelson's sentence.

IV. THE RESTITUTION ORDER.

We review restitution orders and the factual findings underlying them for abuse of discretion. *United States v. Woodley*, 9 F.3d 774, 780 (9th Cir. 1993). A defendant's present indigence need not preclude an order of restitution. *United States v. Smith*, 944 F.2d 618, 623 (9th Cir. 1991), *cert. denied* 112 S.Ct. 1515 (1992). The district court's restitution order against Mitchelson is within its discretion if there exists in the record "some evidence that [Mitchelson] may be able to pay [ ] the amount ordered in the future." *United States v. Ramilo*, 986 F.2d 333, 336 (9th Cir. 1993). The rule takes into account the fact that the defendant's financial status can and often does change. *United States v. Jackson*, 982 F.2d 1279, 1284 (9th Cir. 1992).

The district court considered evidence in the record that Mitchelson had the potential to collect one outstanding fee or over $7 million. The court also pointed to testimony that Mitchelson had the potential to sell book and movie rights to his noteworthy legal career and life. In light of this evidence, the district court did not abuse

its discretion in ordering restitution in the amount of $2.16 million.

CONCLUSION

The judgment of the district court is, in all respects, AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARVIN MORRIS MITCHELSON, Defendant-Appellant.	CA No. 93-50279 DC No. CR-92-00716-WK ORDER (Filed Jun. 5, 1995)

before: CANBY AND NOONAN, CIRCUIT JUDGES AND KING* District Judge

The panel has voted unanimously to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX C

TITLE 26 SECTION 7206(1)

Any person who –

(1) *Declaration under penalties of perjury.* –

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or . . .

shall be guilty of a felony and upon conviction thereof, shall be fined not more that $100,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

(2)

Supreme Court, U.S.
FILED
NOV 1 1995

No. 95-353

In the Supreme Court of the United States

OCTOBER TERM, 1995

MARVIN MORRIS MITCHELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly instructed the jury on the element of willfulness in a prosecution under 26 U.S.C. 7206(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-353

MARVIN MORRIS MITCHELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 51 F.3d 283 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1995. A petition for rehearing was denied on June 5, 1995. Pet. App. 1b. The petition for a writ of certiorari was filed on August 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on four counts of willfully subscribing a false tax return, in violation of 26 U.S.C. 7206(1), and was sentenced to thirty months' imprisonment, to be followed by one year of supervised release. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-8a.

1. Petitioner is a domestic relations attorney who, despite a thriving practice, faced serious financial difficulties in August 1985. Petitioner had not filed federal income tax returns since 1982 and had numerous tax liens and civil judgments pending against him. Petitioner's tax lawyer asked Richard LeRoy, an accountant, to assist in the management of petitioner's financial affairs. The assistance was to include the establishment of financial controls for petitioner's law office and the preparation of his past due 1983 and 1984 federal and state tax returns. Petitioner agreed to cooperate fully with LeRoy in reporting his income and expenses. Gov't C.A. Br. 3-4.

Despite those assurances of cooperation, LeRoy encountered difficulties in preparing petitioner's 1983 and 1984 tax returns. After LeRoy told petitioner that he needed to identify the sources of petitioner's bank deposits, petitioner provided LeRoy with handwritten notes, which petitioner described as complete and containing contemporaneous summaries of monthly income for 1983 and 1984, broken down by client. Petitioner told LeRoy that those handwritten notes were his "bible." He eventually provided LeRoy with a similar summary of income for 1985. Gov't C.A. Br. 5.

LeRoy used the handwritten summaries to calculate petitioner's gross income for the tax years in question. The evidence at trial demonstrated, however, that petitioner had omitted from the summaries substantial fees paid to him by clients in more than 25 cases. Moreover, despite the financial controls that LeRoy had placed on petitioner's office, petitioner concealed from LeRoy payments exceeding $900,000 received during tax year 1986. Gov't C.A. Br. 5-6.

Petitioner also told LeRoy that the payments reflected in the handwritten summaries included some fees that had been distributed to co-counsel. At LeRoy's request, petitioner provided a letter listing those portions of the fees attributable to tax years 1983 through 1985 that had been paid to co-counsel. LeRoy used those figures to reduce petitioner's gross income. The figures produced by petitioner, however, overstated the amounts paid to co-counsel by about $700,000. Gov't C.A. Br. 8. Petitioner also reported false business deductions for 1985 and 1986; he told LeRoy that certain personal expenses were deductible business expenses. *Id.* at 9.

2. At trial, petitioner testified that he had never intended that LeRoy rely only on the handwritten summaries and the letters listing co-counsel fees to prepare his returns. He also presented evidence that LeRoy's accounting practices were deficient. On cross-examination, however, the government demonstrated that petitioner had previously represented to prosecutors and the grand jury that his handwritten notes were highly accurate summaries of the fees that he had received. A government witness also testified that LeRoy had satisfied an accountant's standard of care. Gov't C.A. Br. 13.

The district court instructed the jury that, to convict petitioner of subscribing a false tax return, it was required to find that petitioner had acted willfully. The court defined willfulness as "the voluntary and intentional violation of a [known] legal duty." Pet. App. 5a; see Court's Instr. No. 12 (App., *infra*, 1a). The district court also charged the jury that it had to find that petitioner "did not believe the return to be true and correct as to a material matter." *Ibid.*

Petitioner proposed two additional instructions on the requisite mental state for conviction. He first proposed that the jury be charged as follows:

> The crime charge[d] in this case . . . requires proof of specific intent before the defendant can be convicted[.] . . . To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids * * * purposely intending to violate the law[.] . . . An act or failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

See Pet. 4. The district court rejected that instruction. Pet. App. 5a. It also rejected a proposed charge that "[n]egligent conduct is not sufficient to constitute willfulness," *ibid.*, stating to defense counsel that "[y]ou can argue it, certainly," but that the proposed instruction was "argumentative in form." Gov't C.A. E.R. 1057.

3. The court of appeals affirmed. Pet. App. 1a-8a. It rejected petitioner's contention that the district court's refusal to give the proposed instructions was error. *Id.* at 4a-5a. The court ruled that the district court's definition of willfulness was "a correct statement of the law," *id.* at 5a, and pointed out that the

charge was taken directly from this Court's decision in *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). Pet. App. 5a. It also rejected petitioner's argument that the instruction as given did not make sufficiently clear that a finding of negligence would preclude a finding of willfulness on his part. The court observed that petitioner had presented evidence that the false statements on the returns were the result of LeRoy's purportedly negligent belief that he had reported all of petitioner's income, and thus the jury had been made aware of petitioner's theory of the case. *Ibid.*

ARGUMENT

Petitioner contends that the district court erred when it declined to instruct the jury on what he calls his "good faith" defense to the charge of willfully subscribing a false tax return. Pet. i, 7. He acknowledges (Pet. 6-7) that, under *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam), the district court's instruction on the definition of willfulness was proper as given and no further good-faith instruction was necessary. He contends, however, that *Pomponio* is in conflict with *Mathews* v. *United States*, 485 U.S. 58 (1988), which holds that a defendant is entitled to an instruction on any recognized defense for which there is sufficient evidence before the jury. He also contends that the courts of appeals are in conflict on whether, in a criminal tax case, a trial court must give a separate instruction on a defendant's good-faith defense even when that court has properly instructed the jury under *Pomponio* on the definition of willfulness. The instruction given by the district court in this case was correct, and there is no conflict between *Pomponio* and *Mathews*;

furthermore, the claimed conflict among the courts of appeals does not warrant this Court's review.

1. a. In *Pomponio*, this Court reaffirmed that, in the context of criminal tax cases, "willfulness * * * simply means a voluntary, intentional violation of a known legal duty." 429 U.S. at 12; see also *Cheek* v. *United States*, 498 U.S. 192, 200-201 (1991). The Court thus reversed a decision by the Fourth Circuit holding that the jury in that case had been improperly instructed that "[g]ood motive alone is never a defense where the act done or omitted is a crime." 429 U.S. at 11. The Court stated that, because the trial court had correctly instructed the jury on the definition of willfulness, "[a]n additional instruction on good faith was unnecessary." *Id.* at 13.

Here, as in *Pomponio*, the jury was properly instructed on willfulness; indeed, the instruction was virtually identical to the one held to be sufficient in *Pomponio*. The district court declined to instruct the jury further about negligence, mistake, or accident, but only because it correctly concluded that those matters were adequately covered by the definition of willfulness, not because it intended to preclude petitioner from arguing that his subscribing a false tax return was merely negligent, and not willful. The court refused the negligence instruction because it believed that the formulation was argumentative, but petitioner was expressly left free to argue negligence to the jury.

It is well settled that a defendant is not entitled to have the jury instructed in words of his choosing; it is sufficient if the instructions given adequately cover the relevant issues and correctly state the applicable law. See, *e.g.*, *United States* v. *Davis*, 953 F.2d 1482, 1492 (10th Cir.), cert. denied, 504 U.S. 945 (1992). The

willfulness instruction in this case fully satisfies that standard, for the instruction precluded the jury from convicting petitioner on the basis of conduct resulting from mistake, accident, or negligence. Accidental actions or actions resulting from mere negligence are not voluntary, intentional violations of the law. The jury also could not have convicted petitioner for subscribing a false return if it believed that the material falsity was the result of an honest mistake as to the facts or law, for the court instructed the jury that, to convict, it had to find that petitioner did not believe that his returns were truthful. See p. 4, *supra*. The court of appeals thus correctly ruled that there was no need for a separate instruction on negligence, accident, or mistake.

b. *Mathews* is not inconsistent with any of the above. In *Mathews*, the Court held that, "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." 485 U.S. at 63. *Mathews*, however, involved the affirmative defense of entrapment, and it relied on other cases involving affirmative defenses, such as self-defense. See *id.* at 63-64 (discussing, *inter alia*, *Stevenson* v. *United States*, 162 U.S. 313 (1896)). This case does not involve an affirmative defense of "good faith," and in fact petitioner never requested a "good-faith defense" instruction from the district court. Rather, he requested that the district court refine its definition of willfulness, one of the elements of the offense that the government was required to prove in its affirmative case. In this case, therefore, there is no basis for any contention that the district court precluded petitioner from presenting a defense, as that concept is properly understood.

The only question is whether the district court adequately conveyed the government's burden on willfulness to the jury. In light of *Pomponio*, the instructions accomplished that result.

2. Petitioner contends that review is warranted because other courts of appeals have concluded, since *Mathews*, that, even if a jury is given the correct *Pomponio* instruction on willfulness, an additional good-faith defense instruction is required in cases in which the evidence supports such an instruction. See *United States* v. *Morris*, 20 F.3d 1111, 1117-1118 (11th Cir. 1994); *United States* v. *Harting*, 879 F.2d 765, 769-770 (10th Cir. 1989); *United States* v. *Casperson*, 773 F.2d 216, 223 (8th Cir. 1985). That contention does not warrant this Court's review.

First, as we noted above, petitioner did not request an instruction on the defense of good faith; he requested a further definition of willfulness. Thus, to the extent that *Morris*, *Harting*, and *Casperson* relied on *Mathews* to conclude that the jury should have been instructed on a good-faith defense, that reasoning has no relevance to this case. Petitioner has not pointed to any federal appellate decision holding that a separate instruction on, or specific reference to, negligence, accident, or mistake is necessary when the trial court correctly charges the jury on the definition of willfulness, and we have found no such decision. The issue treated in *Morris*, *Harting*, and *Casperson* is therefore not properly presented in this case.

Second, notwithstanding the Eleventh Circuit's recent decision in *Morris*, the "discernible trend" in the courts of appeals is against the requirement of a separate instruction on good faith. *United States* v. *Dockray*, 943 F.2d 152, 155 (1st Cir. 1991) (no separate

instruction required). The majority rule is that no such instruction is required. See *ibid.*; *United States* v. *Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 113 S. Ct. 439 (1992); *United States* v. *Sehnal*, 930 F.2d 1420, 1427 (9th Cir.), cert. denied, 502 U.S. 908 (1991); *United States* v. *Wilson*, 887 F.2d 69, 76-77 (5th Cir. 1989); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982). Courts of appeals that have previously indicated that a good-faith instruction should be given have limited those holdings. The Eighth Circuit, which held that such an instruction was necessary in *Casperson*, a mail and wire fraud case, subsequently held that one was not required in *United States* v. *Cegelka*, 853 F.2d 627, 628-629 (1988) (false statement on Medicare forms in violation of 42 U.S.C. 1395nn(a)(1)), cert. denied, 488 U.S. 1011 (1989), and *United States* v. *Sanders*, 834 F.2d 717, 719 (1987) (false statement to government agency in violation of 18 U.S.C. 1001). Both the Fifth and Sixth Circuits have apparently abandoned their earlier rulings that a separate good-faith instruction is required. Compare *United States* v. *Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986), with *United States* v. *Goss*, 650 F.2d 1336 (5th Cir. 1981), and compare *United States* v. *Sassak*, 881 F.2d at 280, with *United States* v. *Duncan*, 850 F.2d 1104, 1117-1118 (6th Cir. 1988). In light of the general trend against requiring a separate instruction, the courts of appeals adhering to the minority rule may reconsider their position.

Finally, although we believe that *Morris*, *Harting*, and *Casperson* were wrongly decided, we also believe that the issue is not sufficiently important in the administration of federal criminal trials to warrant review by this Court. The Court has denied certio-

rari in two recent cases raising a similar issue, see *Reid* v. *United States*, 113 S. Ct. 967 (1993); *Gross* v. *United States*, 113 S. Ct. 439 (1992), and there is no reason for a different result in this case.* All courts of appeals are in accord with the underlying principle that the instructions, considered as a whole, must present the essential nature of the case to the jury and guide the jury to acquit if it believes the defense. The difference of opinion concerns whether, for some offenses, a separate instruction on good faith is necessary, above and beyond instructions that the defendant must act willfully (as properly defined). In light of *Pomponio* and the district courts' broad discretion in formulating jury instructions, we submit that no additional good-faith charge is required. But the existence of a different rule in some circuits, requiring the instruction to be given, is not as a general matter harmful or burdensome to the jury, the government, or the courts.

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* *Reid* involved a prosecution for tax evasion under 26 U.S.C. 7201. *Gross* involved a prosecution for making false statements in filings with the Securities and Exchange Commission, in violation of 15 U.S.C. 78ff(a). We are providing petitioner with copies of our briefs in opposition in both cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1995

APPENDIX

COURT'S INSTRUCTION NO. 12

The defendant is charged in each of the counts in the indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant made, or caused to be made, and signed an income tax return that was false as to a material matter;

Second, the return contained a written declaration that it was made under the penalties of perjury;

Third, the defendant did not believe the return to be true and correct as to a material matter; and

Fourth, the defendant acted willfully.

The willfulness requirement is defined as the voluntary and intentional violation of a known legal duty.